Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-202

FERGUSON REORGANIZED SCHOOL DISTRICT R-2 (FERGUSON-FLORISSANT SCHOOL DISTRICT and WARREN M. BROWN, Superintendent,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

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Dated: August 6, 1975

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit

Petitioners, Ferguson Reorganized School District R-2 (Ferguson-Florissant School District R-2) and Warren M. Brown, Superintendent of the District pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered May 14, 1975.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Joint Appendix beginning at page 1. Hereafter

references to the Joint Appendix are indicated by page numbers in parentheses.

The District Court's Findings of Facts, Conclusions of Law and Order of August 27, 1973 (16), 363 F. Supp. 739, finding, inter alia, that Kinloch School District was unconstitutionally established and ordering the presentation of a plan to desegregate it.

The District Court's Findings of Facts, Conclusions of Law and Judgment of January 9, 1975 (36 et seq.), 388 F. Supp. 1058, ordering the annexation of the Berkeley and Kinloch districts by the Ferguson-Florissant School District.

The District Court's Order of June 7, 1975 (46), modifying the annexation judgment pursuant to the decision and mandate of the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered May 14, 1975. This petition for certiorari was filed within 90 days thereafter. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I

Whether or not Ferguson-Florissant School District, which is locally autonomous, can be merged with an adjacent school district, Kinloch School District No. 18, which was in 1937, by action entirely within the district, divided into two districts, one black and one white, when the boundaries of Ferguson-Florissant were not racially established and when the only real reason for the merger is that Ferguson-Florissant provides desirable racial mix.

II

Whether or not the conduct on the part of St. Louis County Board of Education or the State of Missouri Board of Education, in not submitting to voters in involved districts proposed reorganizations or mergers that would merge the Kinloch School District, i.e., the Kinloch portion of District No. 18, with one or more other districts, constitutes state action that substantially caused inter-district segregation imputable to Ferguson-Florissant.

III

Whether or not the District Court can restructure Missouri's internal government of school districts by abolishing the locally established school district line of the Ferguson-Florissant School District, by setting the tax rate and by designating membership on an elective board of education without regard to the Missouri Constitution and laws when there is no showing that the boundaries of the Ferguson-Florissant School District were established or maintained by invidious discrimination.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution:

Amendments, Article X—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Amendments, Article XIV, Section 1—"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Revised Statutes of Missouri, 1969:

Chapters 162 to 177, inclusive (too voluminous to reproduce here) which contain all the statutes pertaining to public schools. §§ 162.101-162.451 pertaining to six director districts are set forth in Joint Appendix beginning at p. 112.

STATEMENT OF THE CASE

This petition is by the Ferguson Reorganized School District, R-2, more usually referred to as the Ferguson-Florissant School District, to review the decision of the Court of Appeals for the Eighth Circuit affirming a decision of the District Court in a desegregation case directing this District to annex the Berkeley and Kinloch districts. Throughout the proceedings in the two lower courts Ferguson-Florissant has maintained the position that it is not properly included in an inter-district remedy for violations that occurred beyond its boundaries when under the Missouri law local school districts are autonomous.

The Ferguson-Florissant School District, Kinloch School District and Berkeley School District are three of the twenty-six public school districts in St. Louis County, Missouri. Population of St. Louis County as of the 1970 census was just under 1,000,000 persons. The area of St. Louis County is approximately 464 square miles.

At the commencement of the 1974-1975 school year the total pupil enrollment in the Ferguson-Florissant District was 16,556 of which 680 (4%) were black, Berkeley had 4243 enrolled of which 1725 (40%) were black, and Kinloch had 979, all of whom were black. The Ferguson-Florissant District is 16 square miles in area, the Kinloch one square mile and the Berkeley 10.8 square miles. The relative locations of the three districts with respect to themselves and to all districts in St. Louis County are shown on the maps at pages 150 and 151 of the Joint Appendix.

In September 1971 the United States commenced this action by filing its complaint based upon section 407 of the Civil Rights Act of 1964, 42 U.S.C. § 2000C-6 and the Fourteenth Amendment to the U. S. Constitution. It was not at anytime thereafter amended or supplemented.

The complaint (51 et seq.) states that the Ferguson-Florissant School District and its Superintendent "are joined . . . because the relief sought may affect their interests," and that it is "located adjacent to the Kinloch School District." (53 and 54) It charges that the Kinloch School District, "was created by the defendant State of Missouri, Missouri State Board of Education and St. Louis County Board of Education in 1938 as a School District designed to be attended exclusively by black students", and they have "continued to maintain" it "as an all black district." The relief sought was to enjoin all the defendants from "discriminating against black children attending the public schools in the Kinloch School District and require them to take affirmative action to correct the effects of past discrimination based on race." (55) Answers filed on behalf of defendants denied any acts of segregation and invoked, inter alia, the Tenth Amendment to the U. S. Constitution. (57-70)

After trial in August of 1972 the district court handed down its decision August 27, 1973 enjoining all defendants "from

discriminating against any person because of race, color, religion, or national origin in the operation of the public schools of St. Louis County, Missouri" and ordered the State Board of Education and the County Board of Education "to develop and file . . . a plan which will disestablish the racially dual system of school districts in St. Louis County and eliminate the continuing effects of past discrimination against, and denial of equal educational opportunities to, students in the Kinloch District." (16)

The findings of fact and conclusions of law which the district court entered to support its order of August 27, 1973 contain findings concerning the creation of the defendant Kinloch District in 1937. Prior to 1937 there existed in St. Louis County Kinloch School District No. 18 which encompassed essentially what is now the Kinloch District and the Berkeley District. In 1937 pursuant to a statute R.S. Mo. 1929, Section 9325[1] a portion of District No. 18 seceded by organizing and establishing the Berkeley District to be coterminous with the newly organized City of Berkeley thereby leaving the Kinloch district as presently constituted. This action left virtually all the black residents in Kinloch and the white in Berkeley. What remained of Kinloch No. 18 had 872 black and 6 white pupils; Berkeley had 648 white and 16 black. (21) The district court found this separation within the old District 18 to have been racially motivated and therefore unconstitutional.

The findings of 1973 concerning the Ferguson-Florissant School District are limited to a small number of categories which the Court held sufficient to involve that District. The Court found that the Ferguson-Florissant District is adjacent to Kinloch and that when a merger of Kinloch, Berkeley, Ferguson and seven other districts was proposed in 1949 it was defeated

[1] ". . . any incorporated city . . . which is divided by a school district boundary line . . . shall have the right to organize as a separate town or city school district. . . ."

by referendum. (25) These are the only findings that can be directly attributed to the Ferguson-Florissant District. The others are attributed to the State of Missouri directly or through the State Board of Education or the St. Louis County Board of Education. These include, 1) Missouri State Law required segregation prior to 1954; 2) The County and State defendants have proposed reorganization plans but have not included Kinloch because it was all black; 3) Various publications and references by the State have recognized Kinloch as an all black district; and 4) The State has created and maintained Kinloch.

In its findings of fact of January 9, 1975, to support the order of the same date approving the plan to merge all the districts, the district court made other findings for drawing the Ferguson-Florissant District within the charges of invidious acts. (36 et seq.) It found ". . . the evidence in this case shows and . . . this Court has previously found, i.e., an arrangement of school districts which has caused substantial segregation and which is both a vestige of the previously imposed dual school system and a continuing effect of racially discriminatory state actions on the part of the defendants in this case". (38) No evidence on which to base these findings was received by the District Court in the January 1975 hearing that preceded its Order of January 9, 1975. In response to the Ferguson-Florissant position that it was not "involved in the creation of the Kinloch District as an all black district" the district Court said, arguendo, that its findings of August 27, 1973 "indicate that each defendant, including the Ferguson-Florissant School District, is, to a substantial degree, responsible for the maintenance of Kinloch as a segregated district." (38) Again, there are no facts stated or found that support this conclusion.

REASONS FOR GRANTING THE WRIT

I

The Ruling of the Eighth Circuit Court of Appeals and the District Court That Defendant Ferguson-Florissant School District Has Committed Acts Resulting in De Jure Segregation of Pupils Between the Defendant Kinloch School District and Other School Districts in St. Louis County Is Without Basis in Law or Fact and Is in Conflict With the Decisions of This Court.

The Petitioner relies strongly upon this Court's recent decision in the Detroit case, *Milliken, et al. v. Bradley et al.*, 418 U.S. 717, 94 S. Ct. 3112 (1974). There the District Court and the Court of Appeals held that the record supported the findings as to constitutional violations by the Detroit Board and the State to authorize a plan of desegregation embracing not only the City of Detroit District but 53 outlying districts. The principles applied by this Court are most applicable to the Kinloch situation. This Court recognized that it addressed "for the first time, the validity of a remedy mandating cross-district or inter-district consolidation to remedy a condition of segregation found to exist in only one district." This Court said:

> "The controlling principle consistently expounded in our holdings is that the scope of the remedy is determined by the nature and extent of the constitutional violation. *Swann*, infra, at 16. Before the boundaries of separate and autonomous school districts may be set aside by consolidating the separate units for remedial purposes or by imposing a cross-district remedy, it must first be shown that there has been a constitutional violation within one district that produces a significant segregative effect in another district. Specifically it must be shown that racially discriminatory acts of the state or local school districts, or of a single school district have been a substantial cause of inter-district

> segregation. Thus an inter-district remedy might be in order where the racially discriminatory acts of one or more school districts caused racial segregation in an adjacent district, or where district lines have been deliberately drawn on the basis of race. In such circumstances an inter-district remedy would be appropriate to eliminate the inter-district segregation directly caused by the constitutional violation. Conversely, without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."

The original wrong occurred in 1937 when the Berkeley portion of the Kinloch School District No. 18 seceded and formed the Berkeley School District leaving the truncated Kinloch School District. That wrong did not extend beyond the boundaries of the original district. It did not cross to Ferguson. The Ferguson District had no part in the action. The geographical boundaries of the Ferguson-Florissant District have been established without regard to racial considerations. This District has, for long prior to this suit, maintained a completely unitary school system.

The Court of Appeals found that the Ferguson-Florissant School District was not involved in the creation of the Kinloch School District:

> "We agree that the record fails to disclose that Ferguson actively participated in the creation of the segregated Kinloch district. Kinloch was created by discriminatory state action and implemented by the establishment of the Berkeley School District in 1937, leaving Kinloch as an all-black school district". (9)

Not having been involved in the "original sin" of 1937 the lower courts turned to subsequent acts, which they say Ferguson-Florissant did, and acts of State and County boards which they impute to Ferguson-Florissant.

The only direct act charged to Ferguson-Florissant is the defeat at the polls of the County Board's 1949 proposal to merge Kinloch, Berkeley, Ferguson and seven other districts. The lower courts draw their conclusion solely from the results of the election.

The record is devoid of any evidence indicating that any public official of Kinloch, Berkeley, Ferguson or the other local school districts opposed, on racial considerations or otherwise the merger of the districts. Nor is there any evidence that racial considerations played any part whatsoever in the outcome of the election. It may well be significant to note that the voting results in each of the districts indicated that the citizens of Berkeley were in favor of the merger, as were the citizens of Kinloch. The electorate of the old Ferguson district, which comprised then but a part of its present territory, were equally divided on the issue. Only the districts to the north, none of which was contiguous to Kinloch, voted against the merger, and for reasons known only to themselves. Absent additional, independent proof to the contrary, no conclusions with respect to the impact of racial considerations may be drawn from the results of the voting, in light of the district-by-district breakdown, and the results of other merger attempts in St. Louis County in 1949. See St. Louis County Exhibit B which tabulates the results of the several reorganization elections of 1949 most of which were defeated. This exhibit is the only evidence upon which the lower courts both have said that the reorganization was defeated for racial reasons.

All other charges of culpability against Ferguson-Florissant are vicarious. They are purported acts of the State, specifically the St. Louis County Board of Education and the State Board of Education:

(1) Missouri state law required segregation prior to 1954. This is true but there is no finding nor evidence that this dual

system has not been dismantled by the school districts throughout the state. It must be remembered that the local school boards in Missouri have exclusive jurisdiction within their districts. The dismantling of dual systems had to be and was done at the local level. The statutes, R.S. Mo. 1969, Chapters 162 to 177 inclusive, govern the establishment and operation of school districts. For instance each district is a separate legal entity that can sue and be sued (§ 162.311); each sets its own tax rates (§ 164.021); each determines whether or not it shall issue general obligation bonds (§ 164.121); each has autonomy in budgeting and financing (§§ 165.011 et seq.); title to all school properties is in each district; each employs its own teachers and other personnel and sets the salaries and other terms of employment (§§ 168.102 et seq.); each board has control over its curriculum; each has the power of eminent domain (§ 177.041); and in general each board "may make all needful rules and regulations for the organization, grading and government in the school district" (§ 171.011). The powers and duties of the County and State Boards are very limited, consisting mostly of statistical accumulation and distribution, making suggestions and cooperating. See §§ 162.181 et seq. and 161.029 et seq.

(2) The County and State "have proposed reorganization plans . . . but have not included Kinloch . . . because it was all black." It does not follow from this that an inter-district remedy involving only Ferguson-Florissant is justified or required. Neither the County nor State Board has the statutory authority to compel mergers. Any reorganization is proposed by the County Board and is approved by vote within the proposed new reorganized district (R.S. Mo. 1969 §§ 162.161 et seq.) Furthermore, the only evidence to support this conclusion was the testimony of a former employee of the Missouri Department of Education that the St. Louis County Board did not propose inclusion of Kinloch in reorganization, "Because they were an all black school district their neighbors they didn't feel would be favorable to this . . ." Mr. Summers could not remember

whether he was told this by the County Board before or after the 1949 election. It stands to reason, however, that such a statement would not have been made **after** the results of that election were tallied, and when the favorable composite vote of Kinloch, Berkeley and Ferguson would be noted. Certainly, if the statement were made, even, we shall assume, as an expression of board policy, prior to the 1949 election, is not whatever constitutional infirmity emanating from the statement rectified by the subsequent inclusion of Kinloch in the reorganization vote? Finally, Mr. Summer's testimony does not indicate that the attitudes expressed to him on that one occasion ever manifested themselves in the board's refusal to include Kinloch in a subsequent merger plan out of racial considerations. By his testimony, he in fact stated the county Board was "favorable" to inclusion of Kinloch, but leery of the chances of the success of the proposal. The statements expressed may well have been political attitudes or forecasts not expressive of board policy or action. Certainly, inclusion of Kinloch in one of the four plans is some evidence of official policy favoring its reorganization. The fact that Kinloch was included in but one of four plans is not conclusive; other districts, which for financial reasons were equally ripe for reorganization, were also excluded from other than one of the four plans submitted to the electorate.

(3) Various publications and references by the State have recognized Kinloch as an all black district. Again, how can this be an offense by Ferguson?

(4) The State has created and maintained Kinloch. This is merely a conclusion with no facts stated to support it. There are none.

None of these so-called findings mandates the crossing of Ferguson-Florissant's boundary lines. Indeed none, nor all taken together, can establish any purpose or intent upon the part of Ferguson-Florissant to segregate. *Soria v. Oxnard*

School District Board of Trustees, 488 F. 2d 579 (C.A. 9, 1973). The reliance of the lower courts on the "inaction" of Ferguson and the state defendants squarely conflicts with this Court's ruling in *Keyes v. School District No. 1 Denver*, 413 U.S. 189, 93 S. Ct. 2686, 2696 (1973):

> "We emphasize that the differentiating factor between *de jure* segregation and so-called *de facto* segregation to which we referred in *Swann* is *purpose* or *intent* to segregate."

There is no finding by the District Court and there is no evidence on which to base a finding that the Ferguson-Florissant District did any "racially discriminatory acts" that "caused racial segregation in" Kinloch. Even if, arguendo, we accept the State's responsibility for the segregated conditions within the Kinloch School District No. 18, it does not follow that an inter-district remedy is constitutionally justified or required. The acts of segregation all occurred within one district, Kinloch School District No. 18. There is no obligation upon Ferguson-Florissant, or for that matter upon any other of the 26 school districts in St. Louis County to correct the segregative condition existing wholly within Kinloch No. 18 any more than it was the obligation of any of the 53 outlying districts to correct the conditions in the City of Detroit.

After *Brown v. Board of Education*, 347 U.S. 483 (1954), the boundary lines between the Berkeley School District and the Kinloch School District became illegal—a nullity. Those districts became obligated to correct the wrong. This could have been done by court action to set aside the 1937 partition, by statutory annexation or by statutory reorganization. See R. S. Mo. 1969, §§ 162.161, 162.441. The remedy was there all the time and it was a local remedy all that time. The failure to do so cannot be imputed to Ferguson-Florissant via the State from Kinloch-Berkeley any more than from Detroit

through the State to the outlying districts. As this court said in *Milliken*, ". . . the remedy is necessarily designed, as all remedies are, to restore the victims of discriminatory conduct to the position they would have occupied in the absence of such conduct." See also *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), and *Bradley v. School Board of Richmond, Va.*, 462 F.2d 1058 (C.A. 4, 1972), aff'd by equally divided Court, 412 U.S. 92 (1973).

In his concurring opinion Mr. Justice Stewart aptly expressed the principles that are justly applicable here:

> "The Court of Appeals, in affirming the decision that an inter-district remedy was necessary, noted that a plan limited to the City of Detroit 'would result in an all black school system immediately surrounded by practically all white suburban school systems, with an overwhelmingly white majority population in the total metropolitan area.' 484 F. 2d 215, 245.
>
> "The courts were in error for the simple reason that the remedy they thought necessary was not commensurate with the constitutional violation found. Within a single school district whose officials have been shown to have engaged in unconstitutional racial segregation, a remedial decree that affects every individual school may be dictated by 'common sense,' see Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 203 (1973), and indeed may provide the only effective means to eliminate segregation 'root and branch,' Green v. County School Board, 391 U.S. 430, 437 (1968), and to 'effectuate a transition to a racially nondiscriminatory school system.' Brown v. Board of Education, 349 U.S. 294, 301. See Keyes, supra, 413 U.S., at 198-205. But in this case the Court of Appeals approved the concept of a remedial decree that would go beyond the boundaries of the district where the constitutional violation was found, and include schools and school children in many other school districts that have presumptively been administered in complete accord with the Constitution." *Milliken*, 94 S. Ct., l.c. 3132.

II

The Plan of Desegregation Ordered by the Court of Appeals Violates the Tenth and Fourteenth Amendments to the United States Constitution in That It Ignores Missouri Constitution and Laws Establishing Autonomous School Districts by Abolishing School District Boundaries, Setting a Tax Rate and Naming Board Members and Presents a Question of Federal Law That Should Be Definitely Decided by This Court.

The lower courts approved a plan of merging the three districts by directing the annexation of Kinloch and Berkeley by Ferguson-Florissant as authorized by R.S. Mo. 1969, §§ 162.-441 et seq. This goes far beyond these annexation statutes. It establishes a tax rate of $5.38 per $100 valuation, which is the highest of the three existing rates of $3.80, $4.97 and $5.38.

The Missouri Constitution does not permit the $5.38 tax rate without the approval of the voters in the district. These provisions are part of the structure of the State and are totally unrelated to any racial matters. Mo. Constitution of 1945, Art. X, §§ 11 (b) and 11 (c) provides that the board of education can levy a tax that does not exceed $1.25 on the hundred dollars assessed valuation. A rate in excess of $1.25 but not more than three times that rate requires approval of a majority vote; any rate in excess of $3.75 requires a two-thirds vote. The Missouri Supreme Court in *Lewis County C-1 School District v. Normile*, 431 SW 2d 118, held that in consolidation of four school districts the prior separate tax rates applied as the last ones approved by the voters notwithstanding the constitutional provision that "Taxes . . . shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax." Mo. Const., Art. X, § 3.

R.S. Mo. 1969 § 162.291 prescribes the method of electing the directors in six director districts. Each year on the first Tuesday in April two directors are elected for three year terms. The District Court in its Order of January 9, 1975 called off the election in all three districts for April, 1975 but because the Court of Appeals stayed the Order elections were actually held. The Court of Appeals did, however, affirm the District Court's changing the membership of the board of education of the annexing district contrary to the statutes.

It is submitted that the plan violates Amendment X of the U. S. Constitution in that it invades the powers specifically "reserved to the states respectively, or to the people" and violates the Equal Protection Clause of the Fourteenth Amendment. *Haney v. County Board of Education of Sevier County, Ark.*, 429 F. 2d 364, 369 (CA 8, 1970).

The extent of the authority of a district court in a desegregation case to tamper with state constitutional and statutory governmental structure and taxing power among local autonomous school districts is an important question of Federal law which should be definitely decided by this Court.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the decision of the Eighth Circuit rendered May 14, 1975.

Respectfully submitted

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Dated: August 6, 1975